A Momentous Day for the Rule of Law

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Tuesday 1 December 2020 – back in Luxembourg

For the second time after the hearing on 8 March, resulting in an order for interim measures, I went to the European Court of Justice in Luxembourg to witness take two in the infringement case concerning the disciplinary regime for Polish judges. That regime stripped Judge Igor Tuleya of his immunity, suspended him as a judge and reduced his salary just two weeks ago. It had done the same to Judge Pawe# Juszczyszyn in February 2020. In the presence of both, the Commission found itself powerfully supported by Belgium, the Netherlands, Finland, Denmark and Sweden. This post adds to a detailed blow-by-blow account and a news report about the hearing and builds on the account by Bodnar and Filipek about the state of play with regard to the Polish rule of law. It also discusses a Dutch parliament motion adopted on 1 December that addresses Polish judicial independence.

Monday 30 November – boarding in Warsaw

The flight Judges Tuleya and Juszczyszyn took into Luxembourg was not comfortable. They found themselves just seats away from the defence team of the very government that, after creating the Disciplinary Chamber of the Supreme Court and then populating it with political appointees, had disciplined them. Even when on their way to witness how the Commission would seek protection for them and their colleagues in front of the highest EU court they were left to rub shoulders with those who had appointed their non-judicial prosecutors.

Tuesday 1 December 2020 – Five Member States

The Commission put up a straightforward defence of its case. More noteworthy were the detailed interventions by five Member States. It was a rare publicly accessible display about how Member States think about the rule of law, and how they are willing to confront each other in a way that matters and could have direct legal consequences. It was heartening to hear a majority opinion voiced so eloquently.

Belgium made the case for the importance of considering the analysis undertaken by the UN, the Council of Europe and NGOs which provide overwhelming evidence of problems with the Polish disciplinary regime. Warnings such as the Council of Europe's Parliamentary Assembly Report on the Polish rule of law need to be taken into account. It stated that the majority of Polish disciplinary proceedings have been brought against judges who have openly criticised the reform of the judicial system, or against judges who have adopted decisions which are not favourable to the

interests of government parties. Judges have been disciplined simply for sending references to the Court of Justice. “This is a form of harassment”.

“This case is fundamental not merely in a specific field of the law but of fundamental importance for EU law at a horizontal level” is how **Denmark** opened its pleadings. Member State measures that challenge, undermine or infringe the independence of courts must be brought to an end. In contrast to some earlier examples, the Polish government in this case did not follow the Court’s order of 8 April, as Judge Tuleya’s suspension proves. The lack thereof constitutes a failure to comply with the Treaty requirement that the Member States shall provide effective legal protection through independent courts.

The **Netherlands** noted that the Court’s November 2019 judgment in *AK* was clear. The Polish Supreme Court’s Disciplinary Chamber does not satisfy the criteria for judicial independence. If judicial independence is tampered with in any Member State, then the proper effect of EU law across the board is jeopardised. It is crucial, the Dutch agent argued, that the Commission, as guardian of the Treaties, takes action to secure judicial independence. Disciplinary proceedings specifically should contain safeguards to prevent judges being subjected to them because of the content of their judgments. After all, if a court interprets the law incorrectly, its decision can simply be challenged on appeal. Legislation should guarantee that disciplinary proceeding should not aim at the content of judgments. The Polish legislation does not provide sufficient guarantees in that regard, as it expressly mentions the interpretation of the law as a basis for launching disciplinary proceedings.

Finland focused on the chilling effect that the Polish disciplinary system has on judges. Such effects are both real and serious. The Finnish delegation noted that a chilling effect is something that introduces an entirely new element into judges’ work. Working on a case now means knowing that you might end up being accused of a disciplinary offence. Fear of this is not speculation but based on several surveys conducted amongst Polish judges. This affects the judges, but also their families. A Polish judge may have to show exceptional courage just to rule on a case. Some judges do have that courage, others may decide to rule in a way that does not jeopardise their livelihoods. “Judges should not have to display particular courage or heroism to do their job right”.

Sweden argued that although Union law does not require a specific model regarding disciplinary procedures for judges, independence requires that these rules provide guarantees to prevent any risk that the system of disciplining judges functions as a form of political control over the content of judgments. The focus should be on the quality of and guarantees within the disciplinary regime to avoid this. It pointed to the Commission’s recent rule of law report about Poland in which concern was expressed that the Polish system lacks appropriate safeguards to guarantee independence.

The Polish government

The Polish government's substantive rebuttal was somewhat missing-in-action. It told the Court in various ways that this was all a big misunderstanding. It argued that all judicial "reforms" had been intended to harness impartiality and independence of a judicial system that (still) needed to be cleansed (further). Moreover, the disciplinary proceedings had not been primarily applied for disciplinary purposes but rather as criminal proceedings with a disciplinary element – therefore making the Court's Order of 8 April not fully relevant (Bodnar and Filipek explain well why this Polish government argument makes no sense – moreover, why else would you call it the "Disciplinary" Chamber?). The Commission and the five Member States, the Court was told by Deputy Justice Minister Dalkowska, were therefore not defending the law, as they should before a court of law. Rather they were pushing a specific "political manifesto".

It cannot be denied that a political manifesto – a rather extreme one – was indeed being pushed before the Court's Grand Chamber. But that was done by the Polish government itself. For all the angry and disjointed rhetoric, it did not bother to actually present a coherent vision of Union law. Like last time, this likely means it set itself up for a complete defeat in legal terms. It, too, knows that time is of the essence. And as things stand, time is on its side.

A message from Strasbourg

An intervention by Judge Toader highlighted the interconnectedness of the European rule of law defence system. She "just wanted to make everyone aware that about an hour ago the European Court of Human Rights issued an important judgment about judicial independence", i.e. *Guðmundur Andri Ástráðsson v. Iceland*. This was a long-awaited judgment about how irregularities in the appointment of judges could amount to an assessment as a matter of ECHR law that the body they would function in was not "a tribunal established by law"(see here or here). ECHR law of course needs to be taken into account when interpreting Union law and the Charter. "It should be taken into consideration when deciding the case at hand". Not a question, therefore. A warning perhaps?

Advocate General Tanchev asked: "could the Commission clarify what follow-up it has given to the Court's order of 8 April this year?" A certain panic in the benches of the Commission representatives followed. After about 45 seconds the answer was: "We wrote to the Polish government about it and received a reply, which we are now still studying". Still studying… One would hope that, after the Polish government's "clarifications", studying time in Brussels is over, and action time is near. Asking for financial penalties to enforce the Order would seem, well, in order. Even more so because the Advocate General declares he will issue his Opinion on 18 March 2021. For Judge Juszczyszyn that will be thirteen months after his immunity was lifted, for Judge Tuleya five months. Time is of the essence.

A message from The Netherlands

Was it a coincidence that Judges Tuleya and Juszczyszyn, before witnessing all this, had a lay-over in The Netherlands on their flight over from Warsaw? In any event, on 1 December, a large majority of the Dutch Parliament Second Chamber, including all political parties taking part in the current government, adopted a political motion with the following operational paragraph:

“Calls on the government to investigate and to make necessary arrangements to bring Poland before the Court of Justice for failure to fulfil an obligation under the Treaties (Article 259 TFEU), preferably in cooperation with like-minded Member States, and to inform the Second Chamber of the Parliament by 1 February 2021 at the latest”

The instruction is clear. The deadline set by Parliament ensures that this government can still deal with it itself (the general elections being scheduled for 17 March 2021). The Dutch Foreign Minister confirmed he will take up the task to look for allies.

Although this is a significant step, it should be clear that the Dutch government is not the only addressee. Inter-state complaints are and should remain a last resort, reserved for highly principled and exceedingly urgent issues where the Commission refuses to act sufficiently in the face of overwhelming evidence. The Commission should therefore quickly internalise and appreciate that this motion is in fact a call for it to step up to the plate more decisively, while simultaneous work is started on work on a real and legally operational Plan B. In practice this means that the Commission should immediately start enforcing infringement verdicts it already won. Before February 2021 it should also add new cases regarding Poland to the docket that make it likelier that the backsliding with regard to judicial independence is halted decisively. It should, in short, up its game and stop being a part-time, partial and delayed guardian of the Treaties instead of a full-time, comprehensive and proactive one.

A public instruction directed at the government to start work on a back-up plan with a clear deadline to put pressure on the Commission may be the ultimate example of Dutch bluntness. But this motion shows that Polish judges did not only touch Dutch soil. Their plight also touched Dutch hearts.

Beyond Tuesday 1 December – take it away, Commission!

Five Member States led by example by following the Commission’s lead in defending Union law. That is how the EU system was designed to function. Add a simultaneous important ruling of the Strasbourg Court and an unprecedented Dutch parliamentary motion, and this was an important day for rule of law protection in the EU. We will need many more of these before we can start to turn a corner. It will be necessary to play catch-up because all of this was taken seriously way too late. The Commission now knows it has significant support if it decides to take meaningful legal action. It

has now also learned it may lose control and authority over how it defends the rule of law if it does not significantly add to its current actions soon. Even if that would lead to accusations in some corners that it pushed a political rather than legal agenda, a large majority of EU citizens would support the Commission. It should defend the rule of law not as an abstract or purely discursive exercise, but on the basis of the stark realities that real Polish and thus European judges find themselves in. Enough is enough.
